Filed 8/27/19 Ibbetson v. Grant CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRUCE IBBETSON et al.,	
Plaintiffs and Respondents,	G056722
v.	(Super. Ct. No. 30-2017-00958851)
WILLIAM GRANT et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from an order of the Superior Court of Orange County, Nathan R. Scott, Judge. Affirmed. Motion to strike Respondents' brief. Denied.

David B. Dimitruk for Defendants and Appellants.

Hall Griffin, George L. Hampton IV, Michael A. Erlinger, and Kristel A. Robinson for Plaintiffs and Respondents.

* * *

This is another appeal from an order denying a special motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute. (See Code Civ. Proc., § 425.16 (§ 425.16).) In their complaint, two directors of a nonprofit public benefit corporation accuse certain other directors and the corporation's executive director of engaging in self-dealing, breaching their fiduciary duties, misappropriating funds, and engaging in other financial misconduct. The defendants filed an anti-SLAPP motion to strike the complaint, asserting the plaintiffs' claims arise from protected activity. The trial court denied their motion, finding the "claims arise from alleged misappropriation and malfeasance, not any protected conduct." We agree and affirm the order denying the anti-SLAPP motion. We also deny the defendants' motion to strike the plaintiffs' brief due to their alleged lack of standing.

I.

FACTS

The following facts are taken from the pleadings, the declarations, and other evidence submitted on the special motion to strike.

The Newport Aquatic Center (NAC) is a nonprofit public benefit corporation that offers water sports services and programs to the public from an 18,000 square-foot boathouse facility in Newport Beach. It is managed by a board of directors. At the time this lawsuit was filed, those directors included plaintiffs Bruce Ibbetson and Donna Warwick (collectively, Plaintiffs), and defendants William Grant, Jon Van Cleave, and James Netzer. The NAC's Executive Director is defendant William Whitford, who manages the NAC's day-to-day business operations. The NAC's gross receipts from donations and other income total about $2 million per year.

In 2015, when Whitford repeatedly asked for more fundraising, a group of concerned parents of children enrolled in the NAC's junior rowing program demanded

more financial transparency and fiscal accountability from the NAC's board of directors and Whitford. In June 2016, the parents sent a letter to the board and Whitford outlining their concerns with the NAC's financial management. Three months later, they presented a revised financial analysis to the board identifying several apparent problems with the NAC's finances, including about $200,000 in missing cash, $150,000 in unreported debt, and conflicting financial statements.

In response, Plaintiffs, together with two concerned parents, retained Hanzich & Company, Certified Public Accountants (Hanzich), to review and analyze the NAC's books and records from 2011 to 2016. In June 2017, they presented Hanzich's report to the NAC board. The report identified potential operational inefficiencies, potential misuses of junior rowing program funds and donated funds, a possible misuse of NAC credit cards, and other causes for concern, and it recommended the board conduct further investigation.

The Hanzich report somehow was distributed to certain parents of children enrolled in the NAC's junior rowing program. These parents prepared a letter to the NAC's board of directors, demanding that the NAC comply with applicable laws and manage NAC finances in an effective and transparent manner.[1] Around the same time, the parents also presented the board with a lengthy PowerPoint presentation entitled, "NAC: Inappropriate Business Activities and Financial Mismanagement," which detailed various instances of financial mismanagement.

According to Plaintiffs, the NAC's board of directors refused to take action on the Hanzich report, the parents' letter, and the PowerPoint presentation, and Plaintiffs' subsequent attempts to investigate the NAC's books and records were met with hostility from other board members, particularly Grant, Van Cleave, and Netzer, who made a concerted effort to conceal evidence of wrongdoing. Van Cleave, by contrast, claims he

[1] The parent group later retracted its letter without explanation.

conducted an extensive investigation into the Hanzich report's conclusions, but was unable to verify any funds had been misappropriated.

At the public NAC board of directors meetings that summer and fall, Plaintiffs, the other NAC board members, and unidentified members of the public discussed and debated the accuracy of the Hanzich report, the merits of the parents' letter, and the allegations in the PowerPoint presentation. Although the record is silent on what, if anything, Grant, Van Cleave, or Netzer said at those meetings, Whitford addressed the allegations about NAC coaches being paid under the table, for-profit activities at the NAC, the use of NAC premises for other purposes, and the use of NAC funds to purchase two trucks and pay a personal IRS penalty.

Meanwhile, in June 2017, Plaintiffs sent a letter to the NAC's landlord, the City of Newport Beach, inquiring whether taking possession of the NAC's premises was appropriate under the circumstances, and enclosing the Hanzich report and the PowerPoint presentation for the city's consideration. In August 2017, Whitford refuted the allegations of financial misconduct in a letter to the city.

In December 2017, Plaintiffs filed a verified complaint against Grant, Van Cleave, Netzer, and Whitford (collectively, Defendants).[2] They alleged Whitford took advantage of the board's "lack of oversight . . . to perpetuate a long term process of theft, misappropriation and the obtaining of improper personal benefits," and Grant, Van Cleave, and Netzer "were at least complicit in, and potentially were direct beneficiaries of," Whitford's misconduct. The complaint listed numerous examples of Defendants' alleged misconduct, including: the misappropriation over $227,000 of junior rowing program funds; the use of NAC premises and resources to operate a for-profit business for their own benefit; the use of NAC funds to purchase items for themselves and fund their personal lifestyles; the use of NAC funds to purchase automobiles, one of which

[2] Plaintiffs also sued the Attorney General and various current and former employees of the NAC, but those individuals are not parties to this appeal.

Whitford used as his personal vehicle; the use of NAC-issued credit cards to make purchases from West Marine, Home Depot, Amazon, and other locations; the use of NAC funds to purchase gas for Defendants' personal vehicles; the use of NAC boats for vacations, parties, and other non-NAC purposes; the misappropriation of NAC training fees; the use of funds raised for the junior rowing program on other NAC programming and for their personal purposes; the use of NAC premises and machinery to provide boat repair and maintenance services in exchange for cash; giving free NAC memberships and boat storage to friends; providing tax-deductible donation receipts for property donations showing wildly inflated property values; and interfering with Plaintiffs' right as directors to access the NAC's books and records.

The complaint asserted ten causes of action based on Defendants' alleged misconduct: (1) misappropriation of funds and conversion; (2) aiding and abetting misappropriation of funds and conversion; (3) breach of fiduciary duty; (4) aiding and abetting breach of fiduciary duty; (5) violation of Penal Code section 496, subdivision (a) (receiving or concealing stolen property); (6) self-dealing; (7) appointment of receiver; (8) mandatory injunctive relief removing directors from the board; (9) mandatory injunctive relief enjoining Whitford from the NAC's premises; and (10) mandatory injunctive relief declaring the NAC bylaws invalid.

Defendants filed a general demurrer based on Plaintiffs' alleged lack of standing to bring the action, and a week later they filed a "motion to dismiss the entire complaint," which was again based on Plaintiffs' alleged lack of standing. In their moving papers, Defendants argued Plaintiffs had failed to allege they are NAC voting members (see Corp. Code, § 5710) and thus lacked standing to prosecute an action on the NAC's behalf.

A few weeks later, while their demurrer and motion to strike were still pending, Defendants filed an anti-SLAPP special motion to strike the complaint, asserting the "lawsuit arises from [their] exercise of free speech and petition rights."[3]

While Defendants' demurrer, motion to dismiss, and anti-SLAPP motion were all pending, Plaintiffs filed a first amended complaint that was nearly identical to the original complaint, but added allegations regarding Plaintiffs' status as NAC members.

At the March 2018 hearing on Defendants' demurrer and motion to dismiss, the trial court ruled Plaintiffs' first amended complaint rendered Defendants' demurrer and motion to dismiss the original complaint moot and took both matters off calendar. The court, however, left the upcoming hearing on Defendants' anti-SLAPP motion on calendar.

In July 2018, the trial court denied Defendants' anti-SLAPP motion. Among other conclusions, it found Plaintiffs' "claims arise from alleged misappropriation and malfeasance, not any protected conduct." At the hearing on the motion, the court further noted that "[a]n anti-SLAPP motion does not arise just because some aspect of the case may have caught the public eye. An anti-SLAPP motion arises when the plaintiff's claims are based on protected conduct as the statute defines that term.

---

[3] Defendants devoted much of their motion to establishing the "public" nature of the issues raised in the complaint, but made little effort to explain how the case arises from speech or petitioning activity *by Defendants*, instead focusing in large part on the conduct and speech of Plaintiffs. It appears the only conduct *by Defendants* identified in the anti-SLAPP motion that constitutes actual speech or petitioning activity was (1) Whitford's August 2017 letter to the City of Newport Beach refuting the accuracy of the Hanzich report, and (2) the board members' alleged participation in public discussions at the 2017 NAC meetings regarding the accuracy of the Hanzich report and related allegations. Although Defendants' moving papers did not specify what, if anything, Defendants said during those meetings, Plaintiffs supplied some of those missing details when they submitted the declaration of Patrick Rolfes in their opposition.

And I don't read the first amended complaint as being based on any protected conduct as the statute and as the 2,500 cases have construed those terms."

Defendants timely appealed from the trial court's order denying their anti-SLAPP motion. They did not appeal from any other order.

While this appeal was pending, Defendants unanimously voted to remove Plaintiffs from the NAC's board of directors. Three months later, they unanimously voted to terminate Plaintiffs' memberships with the NAC. Defendants then filed a motion to strike Plaintiffs' appellate brief on the grounds Plaintiffs no longer have standing to represent the interests of the NAC.

II.

DISCUSSION

A. *Scope of the Appeal and Defendants' Standing Challenges*

At the outset, we must define the scope of this appeal. In their opening brief, Defendants claim to "appeal from [the] trial court's [July 2018] denial of [their] anti-SLAPP motion *and* from the trial court's [March 2018] refusal to decide their motion to dismiss the action" for lack of standing. (Italics added.) Not so. According to their notice of appeal, Defendants only appealed from the court's July 2018 order denying their anti-SLAPP motion, which is an appealable order. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13).) The notice of appeal did not include the court's March 2018 order finding Defendants' demurrer and motion to dismiss moot. In any event, the court correctly decided to take the demurrer and motion to dismiss off calendar because "the filing of an amended complaint moots a motion directed to a prior complaint." (*State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1131; see *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 506.)

Defendants contend we nevertheless must consider their standing challenges because standing is a jurisdictional issue affecting subject-matter jurisdiction and thus may be raised at any time, including on appeal. While not entirely clear, it appears Defendants' challenges to Plaintiffs' standing are based on (1) Plaintiffs' failure to allege they are NAC voting members, (2) Plaintiffs' removal from the NAC board of directors after the lawsuit was filed, and (3) Plaintiffs' allegedly antagonistic actions toward the NAC. Defendants further contend this alleged lack of standing requires us to strike Plaintiffs' appellate brief.

We have recognized a "party's standing can be raised at any time in the litigation, even for the first time on appeal." (*Applera Corp. v. MP Biomedicals, LLC* (2009) 173 Cal.App.4th 769, 785; see *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233 ["'[C]ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.'"].) We question whether that principle applies here, however, where the appeal is not from a final judgment but from an order denying an anti-SLAPP motion, where our resolution of the appeal does not require us to reach the merits of the case (see II.B, *infra*), and where the trial court has not yet considered the factual or legal merits of Defendants' standing challenges.

Assuming arguendo we may consider Defendants' standing challenges[4], we conclude it is without merit. Plaintiffs have standing to prosecute their claims because they were both directors of the NAC at the time they filed their complaint. (See Corp. Code, §§ 5233, subd. (c)(2) & h [if Attorney General is joined as an indispensable party, director of nonprofit public benefit corporation may bring action to remedy another

---

[4] At least one appellate court has considered a standing challenge in similar circumstances. (See *Steadman v. Osborne* (2009) 178 Cal.App.4th 950, 954-956 [appellate court considered standing argument raised for first time on appeal and consequently did not reach merits of anti-SLAPP motion because plaintiffs lacked standing to bring cause of action at issue].)

director's impermissible self-dealing], 5223, subd. (a) [director may sue to remove from office any director for fraudulent or dishonest acts, gross abuse of authority, or breach of duty].) Plaintiffs' subsequent removal from the board did not divest them of standing because standing under sections 5233 and 5223 is measured only at the time the directors institute the action; in other words, there is no "continuous directorship requirement" to maintain standing. (*Summers v. Colette* (2019) 34 Cal.App.5th 361, 364, 367-374 [director of nonprofit public benefit corporation who filed complaint on behalf of corporation against another director for self-dealing, breach of fiduciary duty, and other misconduct did not lose standing when the board later removed her as a director].) We therefore reject Defendants' standing challenges based on Plaintiffs' subsequent removal from the board.

We also reject Defendants' argument that Plaintiffs' "antagonistic actions" against the NAC deprive them of standing. Defendants cite no binding authority for the notion that antagonistic conduct deprives a director of standing as a matter of law, and we decline the invitation to make factual findings or new law on that point.

For these reasons, we reject Defendants' standing challenges, and we also deny Defendants' motion to strike Plaintiffs' appellate brief.

B. *The Anti-SLAPP Ruling*

1. *The Anti-SLAPP Statute Generally*

The Legislature enacted the anti-SLAPP statute in 1992 to address "what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) The statute authorizes a special motion to strike meritless claims early in the litigation if the claims "aris[e] from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).)

When evaluating a special motion to strike, the trial court must engage in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We review a trial court's order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) The statute requires us to "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We therefore consider not only Plaintiffs' complaint, but also the declarations filed in support of and in opposition to the anti-SLAPP motion. We do not weigh the credibility of that evidence and we """accept as true the evidence favorable to the plaintiff[s]."""" (*Flatley, supra,* at p. 326.)

2. *Principles Guiding Step One of the Anti-SLAPP Analysis*

We begin with step one of the anti-SLAPP analysis, which requires us to decide whether the challenged claims "aris[e] from any act of [Defendants] in furtherance of [Defendants'] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1)). That is, did Defendants make a threshold showing the complaint arises from Defendants' protected activity?

Section 425.16, subdivision (e), defines protected activity to include: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or

oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Alleging conduct that constitutes protected activity under the above definition does not necessarily satisfy prong one of the anti-SLAPP analysis. Only a cause of action "*arising from*" protected activity may be stricken (§ 425.16, subd. (b)(1)), and "the 'arising from' requirement is not always easily met." (*Equilon, supra*, 29 Cal.4th at p. 66.) Our Supreme Court recently addressed what "nexus . . . a defendant [must] show between a challenged claim and the defendant's protected activity" to meet the "arising from" requirement. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).) The Court explained: "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Ibid.*)

The reviewing court therefore must "'distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications or prior litigation may provide evidentiary support for the complaint without being a basis of liability.'" (*Park, supra,* 2 Cal.5th at p. 1065.) "'[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.'" (*Id.* at p. 1063.) Courts must "respect the distinction between

activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Id.* at p. 1064.)

Thus, for a defendant to meet the "arising from" burden, "it is not enough to establish that the action was filed in response to or in retaliation for a party's exercise of the right to petition" or right to free speech. (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804.) Moreover, the fact a cause of action "may have been triggered by protected activity" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*Cashman*)), or the "fact that protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform [the parties'] dispute into a SLAPP suit." (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 478.)

Instead, "the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*Cashman, supra*, 29 Cal.4th at p. 78, italics added.) In evaluating whether that requirement is met, courts consider "the *principal thrust* or *gravamen* of a plaintiff's cause of action" (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520) and determine whether the acts underlying that cause of action were acts in furtherance of the defendant's right of petition or free speech. (*Cashman, supra*, 29 Cal.4th at p. 78.)

3. *Application*

Applying those principles here, we conclude Defendants failed to make a threshold showing that Plaintiffs' claims arise from any protected conduct by Defendants. Instead, the patent gravamen of Plaintiffs' complaint is Defendants' alleged mismanagement of the NAC, their alleged theft of NAC assets, their alleged self-dealing, and their alleged misuse of NAC property for their personal gain. That is immediately evident from both the factual allegations and the particular causes of action in the complaint.

Defendants contend they engaged in protected activity by participating in public discussions regarding the accuracy of the Hanzich report at the 2017 NAC board meetings, and by refuting the accuracy of the Hanzich report in Whitford's August 2017 letter to the City of Newport Beach. That may be so, but neither conduct forms the *basis* for Plaintiffs' complaint. Plaintiffs sued Defendants for corporate looting, theft, misappropriation, and malfeasance, not for denying or disputing whether the alleged misconduct occurred. Again, we must "'distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications . . . may provide evidentiary support for the complaint without being a basis of liability.'" (*Park, supra*, 2 Cal.5th at p. 1065.) That was precisely the case here.

Defendants also contend their "exercise of their business judgment not to file suit" and their decision "to refrain from filing and prosecuting an action was [an] 'act in furtherance of the defendant's [sic] right of free speech.'" We disagree. Inaction is not speech. If it were, all claims based on a defendant's inaction or breach of duty could be stricken under the anti-SLAPP statute, and that is certainly not the case. (See, e.g., *Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 728 [claims for breach of fiduciary duty, constructive fraud, and negligence not subject to anti-SLAPP statute because they were based on board members' withholding information and improperly directing the expenditure of funds, which "are not 'written or oral statements'"]; *Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1161 (*Aguilar*) [officers' and board member's failure to disclose conflict of interest and failure to put shareholders' interests ahead of their own was not protected activity].)

To be sure, "the right of free speech protects both actual verbal communication and expressive, nonverbal conduct" and can even "extend to nonexpressive conduct that intrinsically facilitates the exercise of free speech, such as using public streets, attending public hearings and trials, and lawfully gathering

information about public officials and matters of public concern." (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1080.) But it does not extend to a defendant's alleged exercise of his or her "business judgment" in deciding to do nothing about allegations of corporate looting and malfeasance. "The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights." (*People ex rel. Lockyer v. Brar* (2004) 115 Cal.App.4th 1315, 1317.) Conversely, the point of the anti-SLAPP statute is not to shield a defendant from unrelated allegations of theft and malfeasance.

"What matters at this stage is whether defendants are being sued for exercising their right to petition or speak on an issue of public interest." (*Aguilar, supra,* 207 Cal.App.4th at p. 1164.) The trial court properly found they were not. Because we conclude Defendants failed to make a threshold showing under prong one of the anti-SLAPP statute, we need not address prong two, Plaintiffs' likelihood of prevailing on their claims. (*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 43-44.) We thus express no view on the merits of Plaintiffs' claims or of Defendants' defenses.

C. *Sanctions*

Plaintiffs ask us to award them sanctions against Defendants for filing a frivolous appeal. We deny their request because it is procedurally defective. (See Cal. Rules of Court, rule 8.276 [separate motion with supporting declaration required].)

III.

DISPOSITION

The order denying Defendants' anti-SLAPP motion is affirmed. Plaintiffs shall recover their costs and attorney fees on appeal, the amount of which shall be determined by the trial court. (Cal. Rules of Court, rule 8.278(a)(1); Code Civ. Proc., § 425.16, subd. (c); see *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.)

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.